

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

CASE NO. 99-36


VS.

HICKMAN COUNTY SCHOOLS

FINAL JUDGMENT

James Stephen King
Administrative Law Judge
1661 International Place Drive, #300
Memphis, TN 38120
(901) 767-1234

August 5, 1999

FINAL JUDGMENT

NO. 99-36

This case came to be heard on June 29 and 30, 1999 and July 9, 1999. The trial was bifurcated due to the failure of Jan Hill, an employee of the Department of Children Services to honor the subpoena for her testimony. Ms. Hill was subpoenaed to appear on June 30, 1999; however, she failed to appear, necessitating that the due process hearing be continued until July 9, 1999, in order to allow for an application to the Circuit Court for an order directing Ms. Hill to appear and testify.

ISSUES

The issues to be decided at the due process hearing were (1) does the School System lack the resources to implement the IEP, (2) that the child needs extended school year services this summer, (3) that the School System has discriminated against the child and parent by not allowing the parents to assist in the development of the IEP, and (4) that the School System's proposed educational site at East Hickman Elementary School in the behavioral management class is inappropriate.

FACTS

The Child was born on September 4, 1991. The Child suffers from developmental delays and has a head-banging disorder. The Child entered the Hickman County School System when he was 3 years old, when he was placed in a pre school class at East Hickman Elementary School.

The Child was most recently enrolled in Centerville Elementary School for the second grade. He is certified as eligible for special education, with a diagnosis of emotionally disturbed. Last year he received approximately two hours of regular education the class of Ms. Karen McCord. Ms

Melanie Vincent provided the Child special education services for approximately five hours of the day. The Child has most recently completed the second grade.

The Child's teachers and parents testified that the Child's academic performance has regressed during the school year. Upon reviewing the Child's report card, it appears that the grades fluctuate from each six weeks period; therefore, it does not appear to show a linear regression in performance; however, based on the testimony of both parents and the teachers, the consensus is that the Child has regressed during the school year. The Child's second grade program consisted of approximately two hours of regular education and the remainder of the day in special education. The testimony of the teachers and specialists who have examined the Child, established that the Child's behavioral problems interfere with the Child's ability to learn. The Child's behavioral problems consist of acting out during class, such as by making animal noises, kicking desks, tantrums and not paying attention to his teachers. Some of the reasons the Child acts out is to gain attention and to avoid doing his schoolwork. It appears that when the Child becomes frustrated with his school work, he will act out which allows him to avoid doing his school work by going to Mr. Morgan's office for the 15 minute periods of isolation. In order to deal with the Child's behavioral problems, the School System implemented a behavioral management plan which offered rewards and punishments for the Child's misbehaviors. If the Child misbehaved, he will be taken out of the class for a 15 minute period of isolation. The School System hired Mr. Lonnie Morgan to supervise the Child during the periods of isolation. If the Child cooperated with his teachers, he was given rewards which consisted of being allowed to go to the principal's office and make drawings, walking with Ms. Linda Gregory, the principal, or going out with Mr. Joe Dooley, the social worker, all activities which the Child enjoyed. The system of removing the Child from the class for 15 minute periods of time

appeared to work when it was first implemented; however, as the school year continued, the system became less effective in controlling the Child's behavior. The School psychologist, Dr. Mark Sigler testified that isolation had been over used and recommended that isolation only be used in certain limited circumstances. The IEP was modified to reflect Dr. Sigler's recommendation.

Dr. Bullock testified that the Child's IQ was in the low normal range; however, that may be a false finding because the Child's disability interfere with testing. Dr. Bullock, Dr. Sigler and Mr. Morgan stated that the Child manipulates the adults around him. This may contribute to the real issues in this due process hearing which is the deplorable state of the relationship between the School System, personnel and the Parents.

The disputes and controversies between the School System and the Parent and too lengthy to recite in this opinion. However, a brief summary of some of the major controversies between the parties will adequately give a gist of the problem.

This is the fourth Due Process hearing in the past four years. I presided over the hearing held in 1997, 1996 hearing was dismissed with a consent order and 1998 hearing was concluded with a decision in favor of the School System.

The mother was originally employed by a janitorial service which provided services at East Hickman Elementary School. The mother reported that certain teachers were taking furniture and other property belonging to the School System home with them. Apparently the mother complained to the School Board and other School officials and this resulted in a memo being circulated directing that the property be returned to the School System. The mother also reported than unqualified student aide was performing therapy on a cystic fibrosis student. The mother was subsequently

terminated from her position with the cleaning company. The mother believes that this was at the insistence of the School personnel.

The Parents have made complaints to the Tennessee Department of Education regarding Mr. Dooley, the Child's social worker, against the School System, alleging that it did not implement the IEP. The Parents have complained also to the Office of the Civil Rights. The Parents have also made complaints to various state legislators, federal legislators, the Governor and the President of the United States. In February, 1999, the Parent filed a complaint with the attorney general regarding the theft of school property which allegedly occurred in 1995.

The Parent has also filed complaints with the Tennessee Department of Children's Services ("DCS"), alleging that the Child's teacher had abused the Child. Apparently this complaint arose out of an incident in the gym where the Child was hit in the mouth with a ball during physical education. The Parent did address the School System personnel regarding what happened, but never obtained an answer which satisfactory to the Parent; therefore, resulting in a complaint to the DCS. After investigation, DC dismissed the complaint.

The School System has contributed to the volatility of the situation. The School System, has on occasion, failed to return the Parent's phone call. The School System has failed to advise the Parent when it has addressed particular complaints of the Parent. The School System has scheduled IEP Team meetings at times that are inconvenient to the Parent and sometimes at short notice to the Parent.

It appears that some of the conflict between the parties arises from the tragic series of misperception of actions. For example, the School System had sent a note home with the Child requesting that when the Child brought his lunch to School and the lunch required silverware that the

Parents send a plastic spoon with the lunch. The Parent perceived this a discrimination against their handicapped child because all other children had access to silverware in the cafeteria. However, the School System's reasoning for requesting that the Parents send a plastic spoon was that the Child did not know to request silverware as he went through the line and would be seated without silverware. It was not until the teacher would then come and examine what the Child was eating that the teacher would realize that the Child needed silverware and would then have to go the kitchen to get silverware. Also depending on the school menu silverware that the child required for his lunch from home might not be placed out for the student body. Apparently non-disabled students brought their own silverware. After the Parent made a complaint of discrimination, the principal solved the problem by providing plastic forks and spoons for the Child. The misperceptions between the parties have caused events to be blown out of proportions. There is no doubt that the Parents are very concerned about their Child and involved in his life; however, at times it appears that the Parents attack the School System on matters that should be resolved through communications rather than attacking the School System. Dr. Bullock did shed some light on this matter and he testified that any of these responses were emotional responses which he was not sure could be controlled.

Based on the questioning by the Parents and this testimony, the Parents may have expectations that the School System has obligations that it does not have. For example, if the Child has a tantrum, the Parents seem to expect that the school will call the mother to come to the school. When the school does not telephone the Parent the Parent perceives this as the School Systems excluding them or failing to communicate. The Teacher would send a written report home with the Child. This is more than sufficient notice. The school was not required to telephone the Parents in these instances. The parents also seemed to imply that they should be included in all discussions that the school is

presumed to have concerning the Child. Implementation of the IEP is the school's responsibility. School personnel do not have to consult the Parents when they want to discuss among themselves how they will implementing the IEP or handle the routine matters of educating the child.

The net result of all the acrimony between the Parents and the School System is that it harms the Child. Dr. Bullock, Dr. Sigler and Mr. Dooley all testified that the biggest impediment to the Child's educational success was the high level of conflict that exists between the Parents and the School System. Dr. Sigler testified that he saw a correlation between the letters of complaint being written by the Parent and an increase in behavioral problems with the Child. This would appear logical when a Child observes the Parents and the School System in a conflict, the Child may begin acting out because he is encouraged by the behaviors he observes.

LAW

I. Does the School System lack the resources to implement the IEP?

The School System proposes placing the Child in a behavioral modification class which will be located at East Hickman Elementary School. The class is taught by Ms. Garrett and will have approximately 3 other students in the class. The goal of the class is to modify the Child's behavior so that the Child can transition back into his normal classroom environment. The Child will receive counseling services from Mr. Joe Dooley while in the behavioral modification class. Based on the proof presented, there has been no evidence that the School System does not have the resources to implement the behavioral modification class. The testimony presented establishes that the School System has a location for the class, a teacher for the class and sufficient support available to implement the IEP; therefore, I find that the School System has the resources to implement the IEP.

II. Does the Child need extended school year services?

A child is entitled to an extended school year if it would not merely be beneficial but a necessary component of an appropriate education for the child. Cordrey v Euckert, 917 F.2d 1460 (68 CR 1990). The Cordrey court stated that ESY is a necessary component of an appropriate education if it would prevent significant regression of skills or knowledge retained by the child so as to seriously affect the progress towards self sufficiency. The court went on to note that providing ESY is the exception and not the rule under the regulatory scheme. Giving those policy considerations therefore, it is incumbent upon those proposing an ESY for inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, then an ESY is necessary to avoid something more than adequately recuperable regression. *Id.*

In the case at hand, the testimony has demonstrated that when the Child returned to school after the summer between the first and second grade that the Child was making passing grades. Dr. Sigler testified that from reviewing the Child's records he did see any regression of the Child over the past summer that would not be recoupable and would require an ESY program. During the course of the year, the Child's grades regressed. Typically the regression that would mandate ESY would be regression occurring during the summer when the Child is not in school, not regression occurring during the school year.

In this case, evidence has not been presented which would show that the Child would have a significant regression of skills without a summer program. On the contrary, it appears that the Child is regressing during the school year. Based on the testimony received during the due process hearing, the Child's regression during the school year was a result of the Child's behavioral problems. The Child's behavioral problems are aggravated by the conflict between the School personnel and the Parent. During the school year, the Parent filed complaints with the Department of Children Services

alleging that the Child had been abused, the Parent filed a complaint with the District Attorney General's Office regarding an alleged theft occurring more than 4 years ago. The Parent has made complaints to the Tennessee Department of Education, the Office of Civil Rights and various and sundry state and local officials. I am convinced that the Child is picking up on the hostilities of the Parents towards school personnel and that it is affecting his behavior. If the Child observes that the Parents hold the School System personnel in utter contempt, it will only encourage the Child to be a behavioral problem at school. Dr. Bullock testified that the Child manipulates and may undertake to create conflict to observe the adults reaction. Therefore, the Parents and school personnel must present a united front as opposed to two warring factions. The Parents must examine their motives and responsibilities in creating conflicts that are adversely affecting their Child.

III. Has the School System discriminated against the Child and family by not allowing the Parent to assist in the development of the IEP?

The Parents claim that they are not allowed to assist in the development of the IEP seems to stem from the fact that the School System employees have talked about a proposed recommendation to the IEP team prior to the IEP meeting. Also Dr. Sigler developed a modification to the behavioral modification plan which he had prepared and typed and brought to the IEP team meeting. The Parents contend that they did not have input in the development of the modifications since Dr. Sigler had already typed it prior to the start of the meeting.

The regulations provide "each public agency shall take steps to insure that one or both parents of the child with a disability are present at each meeting or are given an opportunity to participate, including (1) notifying the parents of the meeting early enough to insure that they will have an opportunity to attend and (2) scheduling the meeting at a mutually agreed time and place 34 CFR

§300.345(a). The regulations further provide at 34 CFR §300, App. C. Question 26 (1996) "the parents of a child with disabilities are expected to be equal participants along with the school personally in developing, reviewing and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's needs for special education and related services, (2) join with the other participants in deciding what services the agency will provide to the child."

Based on the testimony at the due process hearing, it was established that during the IEP team meetings, the Parents were free to express their opinions and concerns regarding an appropriate education for the Child. Based on the observations of the Parents during the conduct of the due process hearing, I have no doubts that the Parents set forth their opinions during the IEP team meetings, which according to the testimony lasted several hours. Although the School System's personnel prior discussion of the Child and his program needs prior to the IEP team meeting could lead the Parents to the conclusion that they were be excluded from the process that does not appear to have happened. Based on the evidence presented, it does not appear that the Parents were presented with a "take it or leave it" package with regard to the IEP since the IEP meetings lasted several hours and the Parents have the opportunity to participate

When considering the issue of School personnel prior discussion of the proposed program for the Child prior to the IEP Team meeting, one would hope that the School personnel had given some thought as to what the Child needed prior to arriving at the meeting so that the school personnel could be prepared to make input into their particular area of expertise. However, considering the emotions surrounding this child's program the School System must act carefully to avoid creating the wrong impression about its motives.

Although I find that the School System did not discriminate against the Parents by not allowing them to assist in developing the IEP, the School System is not compliance with IDEA with regard to the development of the 1999/2000 school year IEP. When the IEP was developed, Ms. McCord, the regular education teacher, was called away on an emergency and unable to attend the IEP team meeting. The regulations at 34 CFR §300.344 provides "(a) the public agency shall insure that the IEP Team for each child with a disability includes ... (2) at least one regular education teacher of the child (if the child is, or may be, participating in a regular education environment)." The Child will or may be in a regular education environment in the 1999/2000 school year. Ms. McCord, the regular education teacher, did not participate in the IEP Team meeting. Therefore, the School System is in violation of the regulations and development of the Child's 1999/2000 IEP.

This is not the first instance of the School System's procedural violations with regard to the development of this Child's IEP. In previous IEP team meetings the Parents have requested that Mr. Morgan be allowed to attend the IEP Team meeting. The School System did not bring Mr. Morgan to the meeting, nor even notified Mr. Morgan that his presence had been requested. The regulation provide at 34 CFR §300.344(a)(6) "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related service personnel as appropriate." In this case, Mr. Morgan had supervised the Child during his periods of isolation and the Parents felt that he would have knowledge regarding the Child which would be helpful to the IEP Team; therefore, the School System violated the Parents' rights by failing to have Mr. Morgan present.

Since the IEP Team that developed the 1999/2000 IEP was defectively constituted, if the School System has not already done so, it is directed to reconvene the IEP Team with all the required

parties to properly prepare the IEP following school year. It is my understanding from the post-due process hearing correspondence that the parties have conducted a subsequent IEP Team meeting and, if it has met the requirements of this order, such meeting satisfies the requirements of this order. I would also note that I am not directing that the School System and the Parents come to any agreement on what the IEP should contain, only that the proper procedures be used in preparing the IEP.

IV. Whether East Hickman Elementary School is an inappropriate site for providing the behavioral management class to the Child.

The Parents object to the School System's proposal to educate the Child at East Hickman Elementary School. The apparent basis for the Parents' objection to the East Hickman Elementary School is the hostility the Parents believe exists between them and the staff at the East Hickman Elementary School as a result of the Parents reporting that the teachers at East Hickman Elementary School were taking school property. There has been no testimony that Ms. Garrett, the behavioral education class teacher was in any way involved in the alleged theft of school property, or that Ms. Garrett held any hostilities towards the Parents or the Child.

The general law in this area is that the School System is free to choose the site in which to implement the IEP as long as it does not violate the principal of least restrictive environment. In the case at hand, it appears that the School System has a behavioral management class at East Hickman Elementary School which would address the behavioral difficulties of the Child. The behavioral class is not a class created especially for the Child, but is a pre-existing class which has an enrollment of 3 other students. Further, the School System has already set aside classroom space at East Hickman Elementary School to contain this class.

If the Parents only difficulties were with the personnel at East Hickman Elementary School, the case would be more compelling that the Child should not be educated at that location. However, based on the testimony, the conflicts between the Parents and the School System is a system-wide conflict; therefore, it appears that there will be conflict at any location which the Child has been educated.

The Parents has requested home schooling for the Child. I interpret this to mean that the Parents are requesting for homebound instruction for the Child. The experts, the school personnel and the parents testified that the Child lacks in socialization skills with other children. The parties further testified that the Child becomes frustrated with his environment, he acts out in such a manner to cause the adults to remove him from that environment. If the Child is based placed in homebound instruction, he will miss out on socialization skill, as well as being rewarded for his inappropriate behavior. If the Child is to learn to live in the real world, he must be exposed to it.

School systems are required to children in the least restrictive environment. The homebound instruction would be more restrictive than educating the Child in the School System. Therefore, the law does not favor homebound instruction for the Child unless it is necessary to provide the Child with an education. In this case, the homebound instruction is not only not necessary to implement the Child's educational goals but may interfere with the Child's educational; therefore, request for homebound instruction will be denied.

CONCLUSION

In concluding comments, both parties should realize what effect their continued "sniping" at each other has on the Child. The Parents have evidenced that they are very concerned and loving parents who seek the best interest of their Child. I have witnessed that the mother can be very

charming and agreeable. The father is earnest in his desire that his son graduate high school with an education that will allow him to have meaningful employment. They are "good people" who want to do what is best for their child. However, some of their actions have been very counter-productive to the Child's education and they should in the future examine their motives and consider the effect on the Child before they make an attack on the School System. The School System is not a monolithic entity with a single motive or desire. It is a collection of individuals and next year there will be new teachers. This is an opportunity to start fresh and I would encourage the Parents to do so.

The School System has personnel which are more than capable of dealing with providing an education to this Child. Mr. Morgan and the principal and teachers of the Child all expressed a genuine like for the Child and a desire to see that the Child receives an education. However, the School System is going to have to do its part in controlling the raging emotions which are evident in this case. The School System must return the Parents' phone calls and respond in a meaningful way to their inquiries. IEP Team meetings should be scheduled with adequate notice and due consideration for the Parents' work schedules including holding IEP meetings after 5:00 p.m. so as to accommodate the fathers work schedules. It is the School System's responsibility to educate this Child. In order to carry out this responsibility, it will be necessary for the School System's personnel to interact with the Parents. In dealing with this Child, the School System and its personnel must be conscious of how its actions will be perceived by the Parents and take reasonable steps to make sure that there are no misunderstandings and mis-communications which inflame the current situation.

I cannot enter an Order which will resolve the conflicts between the Parents and the School System. Only the parties involved have that power. Everyone must be conscious of the fact that just

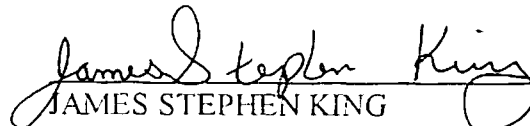
because you disagree, it does not mean that the disagreement is motivated by ill will or malice. The parties must use common sense and common courtesy with each other, or otherwise there will only be one loser in this conflict and that will be the Child.

IT IS ORDERED, ADJUDGED AND DECREED that:

An IEP Team meeting be held to develop an IEP for 1999/2000 school year which has all the proper participants.

There is no prevailing party to this due process hearing.

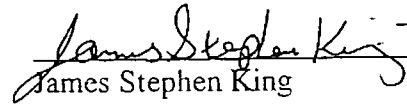
Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the District in which the School System is located. Such appeal and review must be sought within 60 days of the date of the entry of the final order in non-reimbursement cases, or 3 years in the cases involving educational costs and expenses. In appropriate cases, the reviewing court may order that this final order be stayed pending further hearing in this cause.


JAMES STEPHEN KING
ADMINISTRATIVE LAW JUDGE

DATED: August 6, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been sent by postage prepaid mail, this the 6th day of August, 1999, to the school system and the Child.


James Stephen King

ATTACHMENT

PARENTS:



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